

(2014) 03 KL CK 0070

In the High Court Of Kerala

Case No : W.P. (C) Nos. 9102, 31995 of 2006

Babu M. Poulouse

APPELLANT

Vs

Kerala State Electricity Board, Tvm and Others

RESPONDENT

Date of Decision : 18-03-2014

Acts Referred:

Constitution of India, 1950 — Article 309
Evidence Act, 1872 — Section 114
Industrial Disputes Act, 1947 — Section 2(p)

Citation : (2014) 2 ILR 457 : (2014) 2 KHC 187 : (2014) 2 KLJ 522

Hon'ble Judges : Alexander Thomas, J

Bench : Single Bench

Advocate : P.C. Sasidharan and E.S. Ashraf, Advocate for the Appellant; Pulikool Abubacker, Standing Counsel, KSEB, I. Sheela Devi, Mathews K. Philip and S.K. Balachandran, Standing Counsels, BSNL, Advocate for the Respondent

Judgement

Alexander Thomas, J.—The petitioners in the above two writ petitions have initially commenced the service in the Posts & Telegraphs Department (P & T Department) of the Government of India and had applied for appointment as Sub Engineer in the Kerala State Electricity Board through the selection by Kerala Public Service Commission. Upon such selection, they were offered appointment in the Kerala State Electricity Board and they had on their own volition left the service of the P & T Department of the Government of India and had joined the service of Kerala State Electricity Board. It is their case that their prior service in the P & T Department of the Government of India is liable to be counted for the purpose of reckoning pensionable service at the time of their retirement from the Kerala State Electricity Board and also that they are entitled for weightage for this prior service, for regulating their pay, in terms of the long time settlement arrived at by the Kerala State Electricity Board with effect from 08/02/1995. The respondent-Electricity Board objects to the grant of such relief on the ground that the petitioners had failed to produce relevant documents and materials from the P & T Department of Government of India to show that their erstwhile

employer had given consent/no objection before they had applied to the Kerala Public Service Commission for the latter appointment in the Kerala State Electricity Board. The primary objection of the Electricity Board in the matter of the prayer for reckoning the prior service in the Government of India as pensionable service under the Electricity Board is that as per the impugned Board order dated 01/09/2005 [Ext. P7 in WP (C) No. 31995/2006 and Ext. P3 in WP (C) No. 9102/2006], the reckoning of such prior service as pensionable service in the Board can be granted only on realisation of pro rata pension liability from the Departments of the Government of India/Central autonomous body concerned and further that in case the former employer is not willing to pay such pro rata contribution, then the employee concerned cannot be permitted to pay such amount from their own pockets to the respondent-Board. The petitioner in WP (C) No. 31995/2006 had served in the P & T Department of the Government of India for the period from 06/09/1978 to 13/07/1989 (around ten years and ten months) and had joined the regular service of the respondent-Board as Sub Engineer on 15/07/1989 pursuant to selection by the Kerala Public Service Commission. The petitioner in WP (C) No. 9102/2006 had service in the P & T Department of the Government of India for the period from 13/07/1982 to 25/11/1989 (around seven-and-a-half years) and had joined the regular service of the respondent-Board as Sub Engineer from 25/11/1989. Both the petitioners had furnished the relevant service certificates from the P & T Department of the Government of India to the respondent-Board. It is also admitted by them that both had left the service of the Government of India on their own volition so as to take up regular employment under the respondent-Board. While processing their claims, the respondent-Board directed them, as evident from Ext. P3 dated 19/12/2003 in WP (C) No. 31995/2006, to produce documentary proof to show that their applications for recruitment in the respondent-Board was routed through their former employer and with their permission. The petitioners made attempt to get such materials from the P & T Department of the Government of India and as evident from Ext. P5 dated 01/10/2003 [produced in WP (C) No. 31995/2006] the authorities of the Department of Posts of Government of India had duly informed that such records are no longer available with them at that distance of time presumably due to destruction of records. The sheet anchor of defence of the respondent-Board is on the basis of the aforementioned impugned Ext. P7 Board order dated 01/09/2005, which according to them, mandates that the benefit of counting the prior service as pensionable service in the Board can be granted only if the pro rata contribution is actually paid by the Government of India to the Department concerned and that even payment by the incumbents concerned from their own pockets in respect of such pro rata amount is not acceptable at any cost. The Board order fully admits the applicability of certain Government orders issued by the Government of Kerala in the matter of reckoning prior service of such incumbents under the latter employer. The only main objection is that the pro rata contribution should necessarily be paid by the former employer.

2. As regards the first objection of the respondent-Board regarding non-production of documentary proof to show that the petitioners had secured prior permission from the Postal Department of the Government of India before they had applied for selection through the Kerala Public Service Commission for appointment to the respondent-Board, it is to be noted that the aspects relating to application by an employees of the Central Government/other State Government for selection through Kerala Public Commission to entities under the Government of Kerala are governed by the provisions of statutory rules. The rules are titled as the "Kerala Government Servants" Application for Posts (Private Employment and Government Service) Rule, 1958", framed in exercise of powers conferred by proviso to Article 309 of the Constitution of India and is deemed to be treated as statutory rule by virtue of the subsequent enactment in the Kerala Public Services Act. Rule 2(A) of the above said 1958 Rules reads as follows:

2(A) Application for Government Posts.-- (1) An applicant for appointment to a service under the administrative control of the Government of Kerala or to any post therein, shall not be eligible for appointment, if he is in the service of the Government of India or any other State Government and has applied without the consent of the Head of the Office or Department of the Government of Kerala or the consent of the Government of India or the Government of the State concerned, as the case may be, under whom he is employed.

Explanation.-- In the case of an applicant employed under any other State Government or the Government of India, consent of the Government concerned may be presumed if the Appointing Authority is satisfied from the endorsement of the forwarding Officer or otherwise that the application has been made in accordance with the rules made by the Government concerned.

(2)(a) A Government Servant employed in a service under the Administrative control of the Government of Kerala applying for a post or for transfer to a post in another Office or Department of the Government of Kerala shall submit his application through the Head of the Office in which he is working at the time of making the application:

Provided that an application to the Kerala Public Service Commission or to any of its District Offices for appointment to any post notified by it may be presented in original to the Kerala Public Service Commission or the District Office concerned as the case may be with a receipt signed by the Head of his Office that he has received a copy of the application and that he will communicate his objections, if any, to the entertainment of the application within one month of the last date fixed for the receipt of applications. It will be the responsibility of the Head of the Office to inform the Commission or its District Office, as the case may be, either on his own motion or after taking orders of his superiors, whether objection is to be taken for entertaining the application. If such an objection is received by the Commission or its District Office, as the case may be, within one month of the last date fixed for the receipt of the application the application, shall be rejected.

Otherwise, the application shall be admitted.

(b) Applications for a post or for transfer to a post under another State Government or the Government of India by a Government servant shall be submitted through the authority competent to appoint the applicant to the post which he holds at the time of making the application.

(c) The authorities specified in clauses (a) and (b) shall, either on their own motion or after taking orders of their superiors, wherever deemed necessary, decide whether the Government servant may be permitted to apply. Permission shall ordinarily be granted and the application forwarded to the authorities concerned unless it is considered that the grant thereof will not be consistent with the interest of the public service.

From the reading of the above rules, it can be seen that it is mandatory for the applicant to get necessary permission/consent from their previous employer like the Government of India before submitting application for selection through the Kerala Public Service Commission in respect of appointments of any entities under the State Government. As both the petitioners had commenced their services in the Postal Department of the Government of India long ago, it is really difficult for them to produce any documentary proof regarding such permission granted in respect of the applications, which is so stated by none other than the Postal Department of the Government of India as can be seen from Ext. P5 in WP (C) No. 31995/2006. But in view of statutory provisions in the aforementioned 1958 Rules, illustration (e) of Section 114 of the Indian Evidence Act postulates that all such official acts should be presumed to have been regularly performed. Section 114 of the Evidence Act enables that the Court may presume the existence of certain facts and the said provision lays down that the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. Under illustration (e) of Section 114, it is laid down that the Court may presume, inter alia that the official acts have been regularly performed. In view of the aforementioned mandatory provisions of 1958 Rules, it is only to be presumed that a high constitutional functionary like the Public Service Commission would have processed the application of the petitioners herein only after being satisfied about their furnishing the necessary permission or consent or no objection from the Postal Department of the Government of India in order to consider them for regular appointment in the Kerala State Electricity Board. Therefore, the first objection to insist on production of proof regarding such consent pertaining to their applications submitted to the Kerala Public Service Commission for appointment to the respondent-Board, is only to be overruled and it is to be held that the petitioners had in fact secured the selection and appointment in the respondent-Board only after obtaining the necessary procedural permission or no objection from the Postal Department of the Government of India.

3. Now the issue of primary objection of the respondent-Board is to be considered. The 4th respondent in WP (C) No. 9102/2006 has filed a counter-affidavit pertaining to the state of affairs in the P & T Department. In the said counter-affidavit it is stated that as per the office memorandums issued by the Government of India as per Ext. R4(1), even in the case of Government servants (temporary/quasi-permanent/permanent) who have rendered technical resignation on their selection for service in another Central Government department (including Railways/P & T/Defence departments) the liability of pension including gratuity will be borne in full by the Department to which the Government servant permanently belongs at the time of retirement and that this is so even when such a Government servant of the Central Government is transferred to the State Government. Therefore, it is stated that the question of allocation of pension between such departments would not arise and that the liability for pension will be borne in full by the department to which the Government servant permanently belongs at the time of retirement.

4. The impugned Board order dated 01/09/2005 (referred for brevity as Ext. P7) has been issued by the respondent Electricity Board in pursuance of certain Government orders referred to therein. As per GO (P) No. 703/2002/Fin. dated 12/11/2002, the State Government ordered that the employees of the State Government Departments, who left the former service in the Central Government/Central Public Sector Undertakings (PSUs) on their own volition for taking up appointment in the State Government Department will be allowed to reckon their prior service for pensionary benefits in the State Government, if the former employer remits the share of the proportionate pro rata pensionary liability on a service share basis. This GO dated 12/11/2002 is seen adopted by the respondent-Board as per Board order dated 03/09/2003. It is on the basis of this Government order dated 12/11/2002 that the impugned stipulations insisting on pro rata contribution from the Central Government, is seen mandated in clause (1) of impugned Ext. P7 Board order dated 01/09/2005. Ext. P7 Board order has been issued without noting another Government order viz., GO (P) No. 651/03/Fin. dated 06/12/2003 issued by the Government of Kerala themselves, which is in modification of the aforementioned GO dated 12/11/2002. The aforementioned GO (P) No. 651/03/Fin. dated 06/12/03 has been produced by the learned Standing Counsel for the respondent Electricity Board through a memo dated 18th March, 2014. It is seen from the GO (P) dated 06/12/2003 that the Accountant General by letter dated 29/11/2002 had objected to the impugned stipulation in GO (P) dated 12/11/2002 insisting on the pro rata contribution from the Central Government Departments. This must be in deference to the considered decision taken by the Government of India as referred to in aforementioned Ext. R4(1), wherein Government of India ordered that the liability for pension including gratuity will be borne in full by the Department to which the employee permanently belongs at the time of retirement, which is made applicable even for Central Government employees to take up employment in the State Government. Be that as it may, the

Government of Kerala in deference to the opinion of the Accountant General examined the matter and modified the impugned stipulation in GO (P) dated 12/11/2002 and ordered as per GO (P) dated 06/12/2003 that in the case of prior service rendered by Central Government employees in State Government and vice-versa, the liability of pension including gratuity will be borne in full by the Central Government/State Government to which the Central Government employee permanently belongs at the time of retirement and that no recovery of proportionate pension will be made from the Central Government/State Government under whom he had served and that in the case of the employees, who left the former service in the Central Public Sector Undertakings, the orders issued in GO (P) dated 12/11/2002 will stand. This is fully in tune with the Government of India orders dated 09/10/1986 referred to in GO (P) dated 06/12/2003, thereby Government of India in consultation with the State Governments decided to dispense with the system of allocation of pension, leave salary and contributory provident fund between the Central and State Governments and among Departments of various State Governments with effect from 01/04/1987 and the Government of Kerala had earlier reiterated the above decision of the Government of India in GO (P) No. 367/87/Fin. dated 31/03/1987 referred to in GO (P) dated 06/12/2003.

5. Later so as to effectuate the decision reflected in GO (P) dated 06/12/2003, the State Government amended the statutory provision in Rule 11 of Part III KSR. Reference can be made to Rule 10 of Part III KSR dealing with pension, which lays down that the service of an employee does not qualify for pension unless he is appointed, his duties regulated and paid by the Government or under conditions determined by the Government. Rule 11 of Part III KSR stipulates that notwithstanding the provision of Rule 10, the Government may

(1) declare that any specific kind of service rendered shall qualify for pension; and

(2) in individual cases, and subject to such conditions as they may think fit to impose in each case, allow service rendered by an employee to count for pension.

Pursuant to the aforementioned GO (P) dated 06/12/2003, statutory amendment is carried out to Note 2 appended under Rule 11 of Part III KSR, which is evident from Ext. P9 produced in WP (C) No. 31995/2006. As per the said amendment, GO (P) No. 39/06/Fin. dated 23/01/2006 was published as SRO No. 96/2006 in the Kerala Gazette Extra Ordinary No. 237 dated 02/02/2006 and it is notified in the said SRO that the amendment shall be deemed to have come into force on 12/11/2002, which is the date of coming into force of the earlier mentioned GO (P) No. 703/02/Fin. dated 12/11/2002. In order to effectuate the decision in GO (P) dated 06/12/2003, the relevant text of the aforementioned amendment carried out as per SRO No. 96/2006 reads as follows:

Employees of State Government Departments who left the former service in Central Government/Central Public Sector Undertakings on their own volition for

taking up appointment in State Government Departments will be allowed to reckon their prior service for all pensionary benefits along with the service in the State Government Departments. In the case of prior service rendered by Central Government Employees in State Government and Vice versa, the liability of pension including gratuity will be borne in full by the Central Government/State Government to which the Government servant permanently belongs at the time of retirement and no recovery of proportionate pension will be made from Central Government/State Government under which he had served. But in the case of employees who left the former service in Central Public Sector Undertakings, this benefit will be available only if the former employer remits the share of proportionate pro rata pension liability on a service share basis.

Therefore, as regards the Central Government employees, who on their own volition leave the service of the Central Government in order to take up regular appointment in the Government of Kerala Departments, the insistence on pro rata contribution from the Central Government and vice versa is given a total go by and the liability for the pensionary benefits has to be borne in full by the Government to which the employee permanently belongs at the time of retirement. The only issue to be decided in this case is as to whether the benefit of SRO No. 96/06 made effective from 12/11/2002 is to be granted to employees of the Kerala State Electricity Board like the petitioners who had left their prior service from the Government of India on their own volition. The answer to this is to be decided with reference to the provisions contained in the Board order dated 10/12/2002 produced as Ext. P10 in WP (C) No. 31995/2006. It can be seen from Ext. P10 that earlier as per the Board order dated 12/01/1960 the provision of the Kerala Service Rules (KSR) were made applicable to the Board and subsequently as per the communication in Board letter dated 17/08/1968, the Board resolved that the amendments issued to KSR by Government will not automatically apply to the Board employees unless amendments are specifically ordered to be adopted by the Board. Later the Electricity Board felt that there is need to bring in the provisions of KSR and Kerala State & Subordinate Service Rules and their amendments from time to time automatically applicable to the Board unless otherwise ordered and except in the cases where they are governed by special regulations of the Board. Therefore, the respondent Board decided to make applicable KSR and KS & SSR and amendments from time to time to the employees of the Board automatically unless otherwise decided by the Full Board except in cases which they are governed by the some of the rules of the Kerala State Electricity Board referred to in Ext. P10. Such special regulations in the Kerala State Electricity Board mentioned in Ext. P10 are mainly in the field of classification, control and appeal regulations disciplinary proceedings, Tribunal rules etc. are not in any way relatable to the provisions in Part III of KSR governing pensionary benefits. It is further noted that it is only as per Ext. P10 dated 10/12/2002 that the aforementioned Board communication dated 17/08/1968 by which it was ordered that the amendments issued to KSR by Government will not automatically apply to the Board employees unless the

amendments are specifically ordered to be adopted by the Board stands cancelled. As per Ext. P10 it was ordered that the provision in KSR and their amendments from time to time will apply to the employees of the respondent Board automatically unless otherwise decided by the Full Board.

6. So, the statutory amendment to Note 2 of Rule 11 of Part III KSR as contained in SRO No. 96/2006 will apply to the employees of the Kerala State Electricity Board. No provisions by way of orders of the Full Board have been shown to me to establish that the Full Board of the Electricity Board has taken any decision expressly making inapplicable the aforementioned provisions of the SRO No. 96/2006. Then the question is whether the retrospectivity of 12/11/2002 ordered in SRO 96/2006 will automatically apply to the respondent Electricity Board. Prior to Ext. P10 Board Order dated 10/12/2002, the decision was that the amendment issued to KSR by Government will not automatically apply to the Board employees unless the amendments are specifically ordered to be adopted by the Board. But, in view of the provisions in Ext. P10 Board Order dated 10/12/2002, Board has decided to apply the provisions of KSR and their amendments from time to time unless otherwise decided by the Full Board. Therefore, this decision of the Board to automatically apply the provisions of KSR and their amendments from time to time, can be said to have come into force only on 10/12/2002. Hence, the applicability of the amendment to Note 2 of Rule 11 of Part III KSR as per SRO No. 96/2006 can be said to have come into force only on 10/12/2002 as far as its applicability to Kerala State Electricity Board is concerned and not with effect from 12/11/2002 as in the case of the State Government Departments. At any rate, in view of Ext. P10 dated 10/12/2002, the amended provision of Rule 11 Note 2 is applicable to the respondent Electricity Board much prior to the issuance of the impugned Ext. P7 Board Order dated 01/09/2005. Even if SRO No. 96/2006 is held to have only prospective effect from the date of its publication, viz., 02/02/2006, as far its applicability to the employees of the Board is concerned, still the petitioners will get the benefit of that provision, as they continued in service much thereafter. True that the impugned Ext. P7 Board Order dated 01/09/2005 was issued only on the basis of GO (P) dated 12/11/2002 and without noting the substantial changes made to the Government Order dated 12/11/2002 by virtue of the subsequent Government Order issued as per Government Order dated 06/12/2003. But as the impugned clause (1) of Ext. P7 Board Order dated 01/09/2005 is in conflict with the statutory provision in Note 2 of Rule 11 of Part III KSR as amended by SRO No. 96/2006, I have no hesitation to hold that the impugned clause (1) of Ext. P7 Board Order dated 01/09/2005 is ultra vires. It is also to be noted that it is provided in the aforementioned SRO 96/2006 that in the case of employees who left the former service in Central Public Sector undertakings, this benefit will be applicable only if the former employer remits the share of proportionate pro rata pension liability on a service share basis. But, this insistence for payment of pro rata pension liability is only in a case where the former employer happens to be a Central Public Sector undertaking. But in a case where the former employer

is a Department of the Government of India, the full benefit of SRO 96/2006 will accrue to such employees and there is no question of compulsion on the former employer to remit the share of the proportionate pro rata pensionary liability on a service share benefit. Therefore, as ordered by the Government of India and the Government of Kerala, as far as an employee of the Government of India department, who, on his own volition leaves that employment to take up a regular employment in a Department under the Government of Kerala or under the respondent Electricity Board is concerned, the full pensionary liability pertaining to that employee has to be borne by the employer/organisation to which the employee permanently belongs at the time of retirement and no recovery of proportionate pension will be made from the Central Government/ State Government under whom he has served earlier.

7. True that both petitioners had on their own volition by resignation had left the employment under the Government of India so as to take up the regular appointment in the respondent Electricity Board. But the cases of such employees leaving their former employment on their own volition is also taken care of in the aforementioned provisions of the Government Order and in the aforementioned provisions of Note II Rule 11 Part III KSR.

8. As regards the weightage of prior service for the purpose of increments and pay fixation is concerned, it is indisputable that the provisions in that regard are regulated by a long term settlement entered into by the Board with the service unions with effect from 08/02/1995 and that the said provision is a settlement as envisaged u/s 2(p) of the Industrial Disputes Act, 1947 and weightage of past service has been ordered in the said long term settlement depending upon the number of years of service that the Board employees had in their prior employment. At any rate, this is not dependent on any contribution of pro rata pensionary liability from the former employer and even if such insistence is made by the respondent Board, the same is ultra vires in view of the findings rendered herein above. As far as the petitioner in WP (C) 9102/2006 is concerned, it is brought to notice that the respondent Board themselves had given such benefit of service weightage and, later, steps were taken as per Ext. PA dated 02/03/2010 to recover the allegedly excess pay and allowances granted to that petitioner on the premise that the grant of such service weightage was wrong as the pro rata contribution was not made by the former employer. In view of the provisions of the long term settlement and in view of the provisions contained in the aforementioned orders of the Government of Kerala and more particularly those in Rule 11, Note 2 of Part III KSR including SRO 96/2006, it is held that the petitioners are eligible for the said grant of service weightage and consequently Ext. P4 in WP (C) No. 9102/2006 is also to be held as ultra vires and unenforceable. In view of the aforementioned aspects, the Secretary of the respondent Electricity Board or the competent authority concerned is directed to count the prior service of the petitioners in the Government of India Department as qualifying pensionable service under the respondent Board and the said prior service shall also be reckoned for the grant of service weightage and all the

consequential benefits arising therefrom should also be sanctioned and disbursed to the petitioner. It is brought to notice that the petitioner in WP (C) No. 9102/2006 has already retired from service and petitioner in WP (C) No. 31995/2006 is to retire from service in the near future. Consequential benefits to the petitioners on the basis of the service weightage as well as on the basis of the reckoning of prior service as qualifying pensionable service should be computed and disbursed to the petitioners without any further delay. As far as the petitioner in WP (C) No. 9102/2006 is concerned, all such consequential benefits should be sanctioned and disbursed by the respondents 1 to 3 without any further delay, at any rate, within an outer time limit of four months from the date of receipt of a certified copy of this judgment. As far as the petitioner in WP (C) No. 31995/2006 is concerned, the consequential benefits arising out of service weightage benefits should be sanctioned and disbursed to him by respondents 1 and 2 within a period of two months from the date of receipt of a copy of this judgment and the consequential benefits arising out of the reckoning of prior service for pensionable service in the Board should be sanctioned and disbursed to him within a period of four months from the date of his superannuation from the service. Both the Writ Petitions stands allowed to the above extent. There will be no order as to costs.